IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 628

THE INTERSTATE COMMERCE COMMISSION, J. M. KURN and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and ILLINOIS CENTRAL RAILROAD COMPANY,

Appellants,

vs.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION.

ON REARGUMENT.

BRIEF ON BEHALF OF J. M. KURN and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and ILLINOIS CENTRAL RAILROAD COMPANY, RAIL APPELLANTS.

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STATEMENT.

This case was argued on April 7 and 8, 1943. The Court on April 19, 1943 ordered the case restored to the docket for reargument, and requested that counsel direct

their attention particularly to certain questions. We shall deal with these questions seriatum, and shall cite in the course of our discussion of these questions the cases to which we referred in the reargument on May 13, 1943. This brief is filed pursuant to permission given by the Court at the reargument.

A statement of the case will be found in the brief filed on behalf of these rail appellants prior to the date of the first argument. For the Court's convenience we have again set forth in Appendix A the pertinent provisions of the Interstate Commerce Act.

(1) Is Freight Tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

Freight Tariff No. 81 clearly violates Paragraphs (4) and (7) of Section 6 of the Interstate Commerce Act. It violates other sections of that Act, but the violations of these two paragraphs are so clear that it is not necessary to consider *in extenso* the violations of other portions of the Act. We first direct the Court's attention to the violation of Paragraph (4) of Section 6.

The fundamental vice, the underlying illegality in Tariff No. 81 lies in the attempt of the Columbus and Greenville to establish what are in substance and in effect joint rates, not in accordance with the plain requirements of Paragraph (4) of Section 6, but by the absorption of the line-haul rates of connecting carriers not parties to the tariff.

Paragraph (4) of Section 6 provides that the names of the several carriers which are parties to any joint tariffs shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission. The Columbus and Greenville has

made no attempt to comply with this mandate of the statute.

A reference to the record (R. 13-18) will show that Tariff No. 81 is not a joint tariff to which connecting railroads are parties, but on the other hand is a local tariff of the Columbus and Greenville alone. The Columbus and Greenville alone has published and filed the tariff. The tariff, nevertheless, by its plain terms undertakes to establish rates on cottonseed from stations on connecting railroads applying via those connecting railroads to designated mill points. That this is so is shown by Item 5(b) of the tariff, which specifically provides (R. 14):

> "(b) The rates and rules published in this tariff will also apply on Cottonseed, in carloads, from stations on connecting lines, via such lines, to the following manufacturing or mill points on the Columbus and Greenville Railway: Columbus, Miss.; Greenville, Miss.; Greenwood, Miss.; Moorhead, Miss.; West Point, Miss., when the Product, as described in Item 10, is subsequently shipped in carloads, or less than carload quantities, from such points via the Columbus and Greenville Railway."

Mr. Z. P. Hawkins, Traffic Manager of the Columbus and Greenville, in his testimony before the Interstate Commerce Commission in *Docket No. 28590, Cottonseed Allowances of Columbus and Greenville Ry. Co.*, said in reference to Freight Tariff No. 81 (Tr. 6):

> "* * * This tariff applies locally from all points on this carrier to all of its mill points. ***Additionally it applies from stations on connecting lines via such lines to the same mill points,*** where the products of the manufactured cottonseed are reshipped by respondent's lines at the full published tariff rates applying from such point to final destination, which is the identical condition attached to the movement of seed originating on respondent's line." (Italics ours.)

Here is notice to the world by the Columbus and Greenville that it is establishing rates from stations on connecting railroads to these mill points, although, as stated, these connecting railroads are not parties to the tariff. Their names have not been specified therein, and there is no showing that they ever filed any evidence of concurrences in this tariff.

Freight Tariff No. 81 actually contains directions respecting the application of rates which, if they are to be applied at all, must be applied not by the Columbus and Greenville but by the connecting carriers: the St. Louis-San Francisco and the Illinois Central. The form in which this tariff is cast plainly reflects the effort of the Columbus and Greenville to apply the so-called rates named in the tariff from stations on railroads not parties to the tariff.

Paragraph (c) of Item 5 of this tariff, reads as follows (R. 14):

> "The rates published in this tariff, must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates, lawfully applicable to manufacturing or mill point proper, in effect on date of shipment from point of origin."

The Columbus and Greenville has nothing whatever to do with the waybilling of the shipments from stations on connecting lines to the mill points named in Item 5 of the tariff. The shipments do not move via the line of the Columbus and Greenville to those points. The statement in Paragraph (c) of Item 5, that all shipments must be waybilled at full local or joint rates, is addressed not to the Columbus and Greenville but to railroads such as the St. Louis-San Francisco and the Illinois Central which are not parties to this tariff. These railroads, as shown by their own tariffs that are a part of this record (St. Louis-San Francisco Freight Tariff 5162-T, R. 19;

Illinois Central Tariff Supplement No. 12 to 2912-Q, R. 26), publish rates that apply to the movement of cottonseed from points on their lines to the mill points that they reach.

The Columbus and Greenville has sought to establish joint rates not in the manner plainly and imperatively required by the language of the statute itself (Paragraph (4) of Section 6), but by rules in its tariff that provide for the absorption of the line-haul rates of connecting carriers, not parties to its tariff. Paragraph (d) of Item 5 of Tariff No. 81, sets forth the manner in which the Columbus and Greenville will absorb a portion of the line-haul rates of connecting carriers, which line-haul rates the Columbus and Greenville did not collect and never received. The application of Tariff No. 81 to a particular shipment is described by the Commission in its report in *Docket No. 28590, Cottonseed Allowances of Columbus and Greenville Railway* (R. 8).

This is not the first time that a railroad company has taken the law into its hands, and has sought through this same device to avoid and evade the mandatory requirements of Paragraph (4) of Section 6. We list in a footnote * the cases in which the Interstate Commerce Commission has considered this same question, and in which the Commission has uniformly reached the same conclusion: the absorption by one carrier of the line-haul rates or charges of another as a means of establishing through rates is unlawful (*Brick Rates From Danville*, 63 I. C. C. 277, p. 278).

The first of these decisions (*New York, New Haven & Hartford R. R. Co.* v. *Platt and Perry*, 7 I. C. C. 323) was

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* *New York, New Haven & Hartford R. R. Co.* v. *Platt and Perry*, 7 I. C. C. 323; *Coal Rates on Stony Fork Branch*, 26 I. C. C. 168; *C. M. & St. P. Ry. Co.* v. *G. N. Ry. Co.*, 49 I. C. C. 302; *Brick Rates from Danville*, 63 I. C. C. 277; *Southern Class Rate Investigation*, 100 I. C. C. 513, p. 681; *Consolidated Southwestern Cases*, 123 I. C. C. 203, pp. 379-380 and 211 I. C. C. 601, pp. 622, 623; *Paraffine Cos.* v. *D. & R. G. W. R. R. Co.*, 222 I. C. C. 303.

decided on June 26, 1897. It appears from the Commission's decision that the New York & New England Railroad had attempted to establish rates to points on the New York, New Haven & Hartford Railroad by adding to rates that were somewhat less than the local rates of the New York & New England Railroad, the local rates of the New Haven. The total rate thus arrived at was published by the New York & New England Railroad in its own tariff. The Commission said in part (p. 329):

> "The Act to Regulate Commerce mentions two kinds or classes of rates, namely, rates established by a single carrier 'upon its route,' and joint rates 'over continuous lines or routes operated by more than one carrier.' Is the tariff in question a tariff of joint rates? The 6th section of the Act contains this provision:
>
> > 'In cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall * * * be filed with said Commission.'
>
> "The use of the adjective 'joint' in this connection implies that the tariff to which it is applied is the result of agreement or mutual consent, and this implication is strengthened by express reference to the several carriers over a continuous line and the joint tariffs which they established. These terms import concurrence and assent in fixing aggregate rates for a combined service, as distinguished from the separate rates of a single carrier for transportation 'upon its route.'"

The Commission further said (pp. 332-3) in language that has equal application to the case at bar:

> "But it by no means follows that one carrier can add to the duly established rates of another carrier

> any amount it pleases, less than its own local rates, and publish and use that sum as a through rate to points on the line of such other carrier. Such a through rate is neither a joint rate nor a combination rate. It is obviously not a joint rate, for joint rates can be made only by the concurrence or assent of connecting carriers. It is not a combination rate, for one of its component parts has no legal existence or sanction as a separate or local rate. There must be lawful rates upon each of the roads before there can be a lawful combination of rates. Every road is free to make its own rates, but no road of its own accord can charge more or accept less than its own rates for any service it may render. * * *"

The report of the Commission in the *Platt Case* contains an illuminating discussion of the reasons why the principle of rate-making that would permit a railroad to do what the Columbus and Greenville has sought to do in the case at bar would promote neither the interests of the public nor the railroads (pp. 336-339). This case, of course, was decided long prior to the amendments made to the Interstate Commerce Act by the Hepburn Act on June 29, 1906, which amendments included Paragraph (4) of Section 6. This paragraph of Section 6 provided the means by which joint tariffs might be authenticated and the public apprised of the railroads participating therein. (See the historical note dealing with Paragraph (4) of Section 6, Joint Tariffs, on page 1461, Vol. II, Interstate Commerce Acts Annotated. *Cf. Dayton Iron Co.* v. *C. N. O. & T. P. Ry.*, 239 U. S. 446.)

The Commission, in *Coal Rates on Stony Fork Branch* (decided February 10, 1913), 26 I. C. C. 168, after referring to the amendment of 1906 to the Interstate Commerce Act, which now appears as Paragraph (4) of Section 6 of that Act, said (p. 173):

> "There is no provision in the law for the establishment of through rates by absorbing the local rates

> of another carrier for the purpose of establishing through rates over a through route composed of two or more carriers over which through route no joint through rate has been fixed by the agreement."

And as late as May 10, 1937, the Commission said in *Paraffine Companies* v. *D. & R. G. W. R. R. Co.*, 222 I. C. C. 303, that (p. 307):

> "we have repeatedly recognized that carriers cannot establish a rate from or to a point on another carrier's line without the other's concurrence. * * *"

The Commission in several cases has dealt with the kinds of rates recognized by the Interstate Commerce Act (*Through Routes and Through Rates*, 12 I. C. C. 164, pp. 166-167; *Laning-Harris Coal Co.* v. *M. P. Ry.*, 13 I. C. C. 154, p. 158). The Commission in the *Laning-Harris Coal Co. Case* said that there could be but one legal rate between two points—a very simple enunciation of a fundamental principle, that this rate must be either (a) the local rate if over one road, or (b) the joint rate if over a through route composed of two or more roads which have agreed as to a joint rate, or (c) a combination of separately established rates applicable on through business over a through route which does not enjoy a joint rate.

It will be seen that Tariff No. 81 of the Columbus and Greenville purports to establish rates from points on a connecting line, but that the rates thus established do not fit into the category of any one of these three classifications or kinds of rates. The so-called "rates" provided for in Tariff No. 81 are an anomaly. They are unknown to the law.

The Commission hit the nail on the head when it said in its report in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus & Greenville Railway Points* (R. 62):

"The suspended schedules do not lawfully name or provide any legal rates whatsoever. Although the refunds vary with the distances the inbound shipments move, respondent cannot lawfully name, or vary, the inbound rate where the inbound shipment moves over some other line, and the inbound line does not concur in respondent's tariff. In order to make a lawful joint rate with other carriers, their concurrence is necessary under the Commission's tariff regulations, and under Section 6(4) of the Act. * * *"

And the Court will bear in mind that the point we are here making is not that Tariff No. 81 does not comply with some rule or regulation issued by the Commission pursuant to the authority vested in it by Paragraph (6) of Section 6 of the Act, which empowers the Commission to determine and prescribe the form in which the schedules required by Section 1 to be kept open to public inspection shall be prepared and arranged, but that Tariff No. 81 is in the teeth of the statute itself (Paragraph (4) of Section 6).

In *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 553, this Court, in dealing with the validity of certain agreements that contemplated a departure from the established published rate, said (p. 596):

"* * * And as it was conceded that there was no established joint through rate, it likewise is a necessary conclusion that the shipments, even if moving on through bills of lading, should have taken these local rates, unless the latter were superseded or displaced by the special agreement."

Continuing, the Court said (p. 597):

"* * * The chief purpose of the Act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end

> to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates were placed on the same level. Both were required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the Act. * * *"

In the language of the Court in the case just cited, even if the Columbus and Greenville and its connections had agreed upon joint rates, those rates could become legally operative only by being established as prescribed in the Interstate Commerce Act. The joint rates which the Columbus and Greenville has attempted to establish from points on the lines of the St. Louis-San Francisco and the Illinois Central railroads under its Tariff No. 81, have not been established as prescribed by Paragraph (4) of Section 6.

In *Davis* v. *Southern Pacific Co.* (District Court, California, July 15, 1916), 235 Fed. 731, the Court had before it an agreement by the Southern Pacific Company, not included in the published tariffs, under which it undertook to reimburse the California hop growers for local charges in the way of local freight, cartage, warehouse, and similar charges necessary to transport such freight to the port of San Francisco if the hop growers would thereafter ship their freight from San Francisco via the Southern Pacific. The Court after quoting Section 6 of the Interstate Commerce Act, and also a portion of the Elkins Act, said (p. 737):

> "* * * From whatever angle such a contract may be viewed, the net result of its performance was to

> enable hops to be shipped from California to the distant markets, through the medium of interstate commerce, at a less rate than that specified by the railroad company as the rate from California to such markets. The actual diminution in the rate was to be, of course, the amount necessary to be expended by the railroad company in the reimbursement of the shipper for all the local charges and for marine insurance. If this does not constitute a plain and substantial violation of the two provisions of the Interstate Commerce Act last hereinabove referred to, then I am unable to comprehend the meaning of language or to appreciate the force of valid statutory prohibitions."

Continuing, the Court said (p. 741):

> "* * * The case would be precisely the same if defendant company instead of agreeing to reimburse plaintiff's assignors for local charges, including cartage and warehousing, had agreed to reimburse them for expenses incurred in the harvesting and curing of their hops, or some other expenditure by them previously made. The violation of the statute results not from a consideration of where the money was to go to, but from where it was to come from. It was to come from a fund which the law said might not be diminished for any purpose. * * *"

The fact that the refunds to the shipper provided for in Tariff No. 81 of the Columbus and Greenville are the same as payments provided for in the tariffs of the St. Louis-San Francisco (R. 19), and of the Illinois Central (R. 26), is of no legal significance. If as a matter of law the Columbus and Greenville can refund any part of the rates paid not to the Columbus and Greenville, but to another carrier for transportation over that other carrier's line of railroad, the Columbus and Greenville can agree to reimburse a shipper for expenses incurred by that shipper in the production and harvesting of cottonseed.

As we said in the course of the reargument, if the decree of the lower court stands, the result will be to to permit the railroads through tariff publication to grant rebates, to make concessions in the published rates, and to discriminate,—the very things that the Interstate Commerce Act was intended to prohibit and prevent. If the lower court is right, the Pennsylvania Railroad, which does not enjoy the volume of passenger traffic between New York and Chicago that the New York Central enjoys, can publish a rule in its passenger tariffs providing that if a passenger reaches the Pennsylvania Station in New York by bus or cab, and presents a receipt for the fare paid, or if a passenger reaches New York by the New York Central or the New Haven and presents to the Pennsylvania a receipt for the fare paid, such passenger will be given an allowance or rebate of a certain amount from the published New York-Chicago rate if he travels from New York to Chicago via the Pennsylvania. This refund might vary depending upon the means of transportation into New York, the points of origin, and the amounts paid. The result would be chaos in the tariffs and the rate structure, a chaos that would lead to the inequalities and discriminations that we had supposed were forbidden by the Interstate Commerce Act.

This Court has more than once said that the chief purpose of the Interstate Commerce Act was to secure uniformity in treatment, to prevent unreasonable rates, to suppress unjust discrimination and undue preference, and to destroy favoritism, all these being accomplished by requiring the publication of tariffs, the establishment of rates in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable except in the mode prescribed (*Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 597; *New York, New*

Haven & Hartford R. Co. v. *Interstate Commerce Commission*, 200 U. S. 361, 391). And the Commission with these great purposes of the Act in mind has over the years with great patience, with great labor, and with great intelligence worked out elaborate rules governing the construction and filing of freight rate publications. These rules now appear in Tariff Circular No. 20 (effective October 1, 1928). This circular contains many pages of rules dealing with joint tariffs, the list of participating carriers that those joint tariffs must show, and the forms of concurrences which must be given under the different kinds of joint tariffs (pp. 58-70).

The decree of the lower court would nullify all the work that the Commission has done to carry out the mandate contained in Paragraph 4 of Section 6 which requires the parties to any joint tariff to file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission. Indeed, the decree of the lower court repeals Paragraph 4 of Section 6, because under that decree a railroad may establish what are in substance and in effect joint rates by simply publishing in its own local tariff rates from and to points on connecting lines.

Paragraph (1) of Section 6 contemplates two general kinds of rates: local and joint. The very phrase "joint rate" implies an agreement by two or more carriers for the establishment of a joint rate. But the lower court's decree if carried into effect generally would repeal that portion of Paragraph (1) of Section 6 that provides for the establishment of joint rates. For under the decree one carrier has it within its power to publish what are in substance and effect joint rates by absorbing the line-haul charges of connecting carriers.

It is clear from what we have said that Tariff No. 81 clearly violates Paragraph (4) of Section 6. It is un-

necessary to go beyond this particular violation of the law. But it also violates Paragraph (7) of Section 6, which provides that no carrier shall refund or remit in any manner or by any device any portion of the rates specified in its filed and published tariffs.

Tariff No. 81 purports to be a transit tariff. It is not a transit tariff in any sense of the word. It does not provide for transit at a point on the Columbus and Greenville on shipments that the Columbus and Greenville brings into that point and transports from that point. It provides for a rebate from the published tariff rates of the Columbus and Greenville and its connections applying from mill points on the Columbus and Greenville, the rebate being based upon the rate paid by the shipper to another carrier for transportation over such other carrier's line.

Tariff No. 81 has wholly failed to tie up the inbound rate of the connecting carriers with the outbound rate of the Columbus and Greenville. The Columbus and Greenville is not a party to the rate of the connecting carrier from Coahoma, Miss. to Greenville, Miss., if we may use the example set out in the Commission's report in *Docket No. 28590, Cottonseed Allowances of Columbus and Greenville Ry. Co.* (R. 8). The connecting carrier, the carrier that transports the cottonseed from Coahoma to Greenville, is not a party to Tariff No. 81. Thus an inbound shipment of cottonseed from Coahoma to Greenville becomes localized at Greenville insofar as the Columbus and Greenville is concerned.

A shipment of the product manufactured at Greenville from that cottonseed and delivered to the Columbus and Greenville for transportation to Cincinnati is like any other shipment delivered to the Columbus and Greenville at Greenville. The rate lawfully applicable to such shipment is the rate applying from Greenville, and the Col-

umbus and Greenville may not refund or remit in any manner or by any device any portion of such rate. When it does so, as it undertakes to do under the provisions in Tariff No. 81, it is simply paying a rebate from the lawfully applicable rate from Greenville to Cincinnati. Moreover, this rate from Greenville to Cincinnati, which is a joint rate established by the Columbus and Greenville and its connections, is thus reduced without the consent of the other parties to the joint rate. The payment provided for in Tariff No. 81 clearly violates Paragraph (7) of Section 6.

The traffic manager of the Columbus and Greenville in his testimony refers to the refund provided for in Tariff No. 81 as an allowance (Tr. 48 in *Investigation and Suspension Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Points*). But Paragraph (13) of Section 15 permits an allowance to the owner of property only when that owner directly or indirectly renders any service connected with the transportation of property under the Interstate Commerce Act or furnishes any instrumentality therein. Obviously this is not a case where the owner of the property directly or indirectly renders any service connected with the transportation thereof. The owner has paid the published rate of the railroad that originated the cottonseed and that transported the cottonseed to the mill point. If this refund is an allowance, it is clearly in violation of Paragraph (13) of Section 15.

Counsel for the Columbus and Greenville in the course of the reargument, referred to a rule known as the omnibus clause contained in I. C. C. Tariff No. 322. We set forth this rule in Appendix B to this brief. In view of the reference made to this omnibus clause and the fact that the Columbus and Greenville is filing a brief that will presumably deal with this clause, we think it may

be helpful to the Court to comment upon the relevancy of this clause.

The point now sought to be made by the Columbus and Greenville through its reference to this omnibus rule, if we correctly understand the point, is that this omnibus rule made connecting carriers, such as the St. Louis-San Francisco and the Illinois Central, parties to Tariff No. 81. Plainly this omnibus rule has reference only to transit privileges that are local to the railroad publishing the transit privilege. Tariff No. 81 is in no sense a transit tariff. It is not a tariff that publishes transit privileges that are local to the Columbus and Greenville, for the Columbus and Greenville does not bring the cottonseed into the mill point. This tariff attempts to establish rates from points of origin on the lines of connecting carriers via the lines of such connecting carriers to a mill point, and to provide for a rebate of a part of the charge collected by such connecting carriers for transportation over their own lines, provided the product of the cottonseed moves out over the railroad of the Columbus and Greenville. This omnibus rule may not be so construed as to override the clear provisions of Paragraph (4) of Section 6 of the Act respecting the publication of joint rates.

As the Commission itself put it in its report in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points* (R. 56, 63):

> "Based on the foregoing decision (*Central R. Co of New Jersey* v. *United States*, 257 U. S. 247, p. 255), the Columbus and Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences."

Furthermore this reference to the omnibus clause is wholly an afterthought. The Traffic Manager of the Columbus and Greenville, in the course of his testimony in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points* (and this record is here before this Court), said (Tr. 47) that he did not have to indicate the concurrence of the Mobile and Ohio in a tariff applying locally from Columbus to Greenville. He further said (Tr. 48) that the Columbus and Greenville's tariff is an allowance tariff, that the allowances are solely made by the Columbus and Greenville without requiring the participation therein of the Mobile and Ohio, and that there is nothing in the rules of the Interstate Commerce Commission requiring that the Columbus and Greenville get concurrences in a tariff publishing local rates or having strictly local application.

Now for the first time we are met in this Court with the very opposite contention: that these connecting carriers, in some way or other, through the omnibus clause, have joined themselves as parties to Tariff No. 81. If this contention respecting the omnibus clause was to be made by the Columbus and Greenville, in all fairness it should have been presented to the Interstate Commerce Commission, the tribunal that through its knowledge of technical tariff questions would have been in a position to pass upon the matter.

It is of the greatest significance that the brief of the Columbus and Greenville, filed in this Court prior to the first argument, makes no mention of the omnibus clause. The brief expressly states (p. 14) that there is no joint tariff involved in this litigation, and that Paragraph (4) of Section 6 has no application to the facts at bar. And after referring to the decision of this Court in *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, the Columbus and Greenville states that this holding of the Court sets at rest the argument

that I. C. C. Tariff No. 81, to be valid, must have the concurrence of the connecting carriers.

The Commission under such circumstances was wholly justified in making this finding in the case at bar (R. 7):

> "Briefly stated, the justification offered by respondent for its tariff I. C. C. No. 81, is that the tariff is primarily a local tariff publishing rates and rules governing transit privileges on cottonseed, in carloads, at mill points on its line; that the tariff applies locally from all points on its railroad to all mill points located thereon; * * *."

The Commission made this further finding (R. 9):

> "Respondent is not a party to the inbound rates on cottonseed from points on the lines of its connecting rail carriers to the named mill points on its line, and no other carrier is a party to its tariff I. C. C. No. 81."

There was also some hint in the course of the reargument on behalf of the Columbus and Greenville that the cut-back rates on cottonseed maintained by such carriers as the St. Louis-San Francisco and the Illinois Central were applied from stations on the lines of connecting railroads. The Court will see, however, from the pertinent provisions of the tariff of the St. Louis-San Francisco (Item 55, R. 22) and the tariff of the Illinois Central (Rule 55, R. 33), that the cut-back rates provided for in those tariffs apply from the *junctions of these carriers* with connecting lines on shipments originating at points on connecting lines from which no through net rates are published; that is to say, the local rate of the connecting line would apply to the junction point, and the cut-back rates would apply from those junction points as they apply on cottonseed originating at the junction points, and moving to the mill points. These rules can not be distorted into any such rule as appears in Paragraphs (b) and (c) of Item 5 of the Columbus and Greenville's Tariff No. 81 (R. 14).

These rail appellants respectfully submit that for the reasons stated, Columbus and Greenville's Tariff No. 81 is in plain violation of the Interstate Commerce Act.

(2) Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

The cancellation of Tariff No. 81 would not operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville competes. The fact of the matter is, as we shall show, that a continuance of Tariff No. 81 operates unfairly and unreasonably against the railroads, such as the St. Louis-San Francisco and the Illinois Central, that originate the cottonseed.

The Columbus and Greenville and its competitors, the St. Louis-San Francisco and the Illinois Central, do not stand upon a plane of equality as long as Tariff No. 81 remains in effect, for Tariff No. 81 places the Columbus and Greenville in a more favorable position than do the transit tariffs of these other two railroads. A continuance of Tariff No. 81 furthermore deprives these rail appellants of their long hauls on the manufactured products of the commodities that they originate, in the face of the policy of Congress, as announced in the amendment made by the Transportation Act of 1940 to Paragraph (4) of Section 15, that the Commission shall, subject to the conditions named in the statute, give reasonable preference in establishing through routes to the carrier by railroad which originates the traffic. Tariff No. 81 converts the branch lines of these rail appellants into feeders of the Columbus and Greenville and thus destroys the capacity of these branch lines to contribute

to the system revenues of these rail appellants. The result is to jeopardize the continued operation of such branch lines. The competition created by Tariff No. 81 is wholly unfair to these rail appellants, for that competition arises from a tariff that by any standard contained in the Act must be adjudged to be an unlawful tariff. The desire of the Columbus and Greenville to augment its revenues is no justification for the continuance of an unlawful tariff.

It should be borne in mind in the first place that the transit privileges contained in Columbus and Greenville Tariff No. 81 apply not only to shipments that originate on its line, move to a mill point via its own line of railroad, and move outbound from that mill point via its own line of railroad, but to shipments of cottonseed that originate on connecting lines, such as the St. Louis-San Francisco and the Illinois Central, and that move via such connecting lines to the mill points. We may well say as did the Commission in its report in the case at bar (R. 10):

> "On the question of equality of the rates raised in the former proceeding, division 3 said:
>
> > 'Instead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier.' "

The cancellation of Tariff No. 81 would, therefore, merely place the Columbus and Greenville upon an equal basis with its competitors.

We call the Court's attention, in the second place, to the fact that a continuance of Tariff No. 81 is in the very teeth of Paragraph 4 of Section 15 of the Interstate

Commerce Act as amended by the Transportation Act of 1940. Paragraph 4, as amended, provides that in establishing a through route, which the Commission is authorized to establish under Paragraph 3 of Section 15, the Commission shall not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route,

(a) unless such inclusion of would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or

(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation.

Paragraph 4 then reads:

> "*Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

What the Columbus and Greenville has done by Tariff No. 81 is to circumvent the provisions of Paragraph 4 of Section 15. If the decree of the lower court stands and Tariff No. 81 is continued in effect, the result will be to repeal both Paragraphs 3 and 4 of Section 15. For under the plan devised by the Columbus and Greenville, through routes and joint rates can be established by one

railroad acting independently through a provision in its tariff for the absorption of the rates of its connections. There can be no need of continuing in the Commission the power invested in it by Paragraphs 3 and 4 of Section 15 to establish through routes and joint rates, when one carrier acting independently on its own initiative can take the law in its hands, and through such a tariff provision as is here before this Court can establish what are in substance and in effect through routes and joint rates, without the concurrence or agreement of other carriers, and without the limitations that Congress in its wisdom in 1940 wrote into Paragraph 4 of Section 15.

It is clear, therefore, that Tariff No. 81 of the Columbus and Greenville operates unreasonably and unjustly against the St. Louis-San Francisco and the Illinois Central. The decree of the lower court striking down the Commission's order requiring the cancellation of that tariff makes it possible for the Columbus and Greenville to short-haul the St. Louis-San Francisco and the Illinois Central on commodities originated by them, moving to a transit point, there manufactured and moved to points of destination in the North and East. If the St. Louis-San Francisco and the Illinois Central are to be short-hauled, the statute contemplates that this may be done only under an order of the Commission in a proceeding under Paragraphs 3 and 4 of Section 15. No such proceeding has been had. No such order exists.

The Commission in a very recent case, *Docket No. 28647, D. A. Stickell & Sons, Inc.* v. *Alton Railroad Co. et al.*, mimeographed report of March 18, 1943, had occasion for the first time to construe and apply the provisions of Paragraph (4) of Section 15 of the Interstate Commerce Act as amended by the Transportation Act of 1940. The Commission in this case prescribed

through routes on grain and grain products from Chicago, St. Louis, and origins in Central Territory, via Hagerstown, Maryland, to destinations on the Pennsylvania Railroad east of York, Pa. and Fulton Junction, Md. The Pennsylvania Railroad contended among other things that even if the routes sought were necessary and desirable in the public interest, the Commission was without authority to require the establishment of such routes as they would short haul the Pennsylvania without its consent. In holding against the contentions of the Pennsylvania, the Commission placed a liberal construction upon the amendments made to Paragraph (4) of Section 15, a construction that takes into consideration not only the interest of the participating railroads but the interest of the public and the shippers.

The Commission said in one of the concluding paragraphs of its report (Sheet 10):

> "* * * Carriers in many instances availed themselves of the right to their long haul and the disadvantaged localities and shippers had no redress. It was to remedy that situation, apparently, that the second exception was added. The Commission was thereby given authority when it finds that through routes are 'needed in order to provide adequate and more efficient or adequate and more economic transportation,' to require the establishment of such routes although they may short haul one or more of the participating carriers. We interpret that exception to mean adequate and more efficient and more economic from the public or shippers' as well as the participating carriers' standpoint. * * *"

We cite this decision as marking those sections of the Act which, if the Columbus and Greenville chose to invoke them, would enable the Columbus and Greenville to obtain a determination of the question whether under the law it should be permitted to inject itself as an intermediate carrier in through routes from the points of

origin of this cottonseed on the St. Louis-San Francisco and the Illinois Central railroads to the final destinations of the manufactured product.

And the Commission not only possesses the power under Paragraphs (3) and (4), dependent upon the facts of course, to prescribe through routes and joint rates, and to deprive a carrier of its long haul, but the Commission also has the power under Section 1 of the Act to require the establishment of transit under such through routes and joint rates (*Montgomery Cotton Exchange* v. *L. & N. R. R. Co.*, 112 I. C. C. 325, citing *Central Railroad Co. of New Jersey* v. *United States*, 257 U. C. 247, p. 257).

But the Columbus and Greenville, for some reason or other, seems to be unwilling to seek a determination from the Commission on a question that lies entirely within the primary jurisdiction of the Commission on an adequate record: whether through routes and joint rates should be established from points of origin of the cottonseed in Mississippi to the destinations of the manufactured product, which would include the Columbus and Greenville as an intermediate carrier, and which would short-haul the originating carriers.

There seems to be an assumption that the transit tariffs of the St. Louis-San Francisco and the Illinois Central, which provide for these so-called cut-backs, are in some way or other unlawful. The point we emphasize is that these transit tariffs are but conventional and usual ones, and that the provision in the existing tariffs for cut-backs is one that has been recognized and approved by the Commission in many cases over many years.

In *Lawrenceville Cooperage Co.* v. *Akron, C. & Y. Ry. Co.*, 235 I. C. C. 155, the Commission said, in part (p. 163):

"While the instant proceeding relates only to staves and heads manufactured into cooperage, the cut-back arrangements are available in connection with various other forest products. Similar arrangements are established also for several farm products. As to many products of the forest the arrangements have been in effect for more than 40 years, some of the earlier schedules having been prescribed by State authorities."

Continuing, the Commission said (p. 166):

"These cut-back arrangements cannot be said to be unlawful merely because they are different from transit arrangements prevailing generally for other traffic. As stated by division 3, the in-bound and out-bound movements are separate and complete shipping transactions, but there is no provision of law that prohibits their combination and the maintenance of charges that are lower than the combination of the full in-bound and out-bound charges if no shipper is thereby subjected to undue prejudice and no discrimination results. There is no necessity for a requirement that the carriers charge their full combinations or that the established method of obtaining reduced combinations be changed from the cut-back method to some other method."

There are many other cases * in which the Commission has had before it tariffs providing for cut-backs under transit rules. The Commission has recognized that a transit arrangement that provides for a cut-back is simply one of the many forms that a transit privilege may take. The Commission itself said in *I. & S. Docket No. 4599, Allowance on Cottonseed to Columbus and Greenville Points* (R. 60):

* *Transit on Lumber*, 227 I. C. C. 189; *Williams Stave Co. v. Morgan's L. & T. R. & S. S. Co.*, 40 I. C. C. 165; *Brookhaven Lbr. & Mfg. Co. v. Mississippi Central R. Co.*, 132 I. C. C. 241; *Transit on Logs and Lumber*, 136 I. C. C. 125; *Elmore Veneer Co. v. Chicago, M., St. P. & P. R. Co.*, 192 I. C. C. 199; *Farmers Cotton Oil Co. v. T. & P. Ry.*, 246 I. C. C. 603.

> "Transit and similar arrangements, such as provided by these cut-back tariffs, are generally conditioned upon, or granted in consideration of, the obtaining of the outbound haul of the product by the inbound carrier to the transit point. * * *"

The fact of the matter is that under the transit privileges of the St. Louis-San Francisco and the Illinois Central, and also of the Columbus and Greenville, insofar as the transit privileges maintained by it are the same as those maintained by the two roads first mentioned, the result of the maintenance of such transit privileges is to establish, for transportation from the point of origin of the cottonseed to the point of final destination of the manufactured product, a through rate which is somewhat less than the combination of the locals on the mill point. Thus these railroads have but followed the principle of rate making so frequently announced by the Commission that ordinarily a through rate should be somewhat lower than the sum of the intermediate local rates. (Page 535, Vol. I, Interstate Commerce Acts Annotated.)

The effect of the establishment of the transit privilege contained in the tariffs of the St. Louis-San Francisco and the Illinois Central is to unite what would otherwise be two separate legs of a route into a through route, and to establish for that through route, which covers the movement of the cottonseed from the point of origin to the mill point and the outbound movement of the manufactured product from the mill point to the point of final destination, a through rate that is somewhat less than the sum of the rate applying for the movement of cottonseed from the point of origin to the mill point, and the rate applying on the manufactured product from the mill point to the final destination.

But the transit tariff No. 81 of the Columbus and Greenville, insofar as it provides for a refund of the

freight charges paid by a shipper to a connecting railroad for transportation service over that railroad, attempts to tie up two independent parts of a through route, when the Columbus and Greenville has no control over or connection with the first part of the route. Tariff No. 81 shows on its face that the railroads whose lines make up the first part of the through route are not parties to that tariff. Tariff No. 81 is, therefore, wholly ineffective to unite the two separate legs of the route.

We cite below * references to recent decisions of the Commission and of the District Court in a case involving the principles and theory of transit. The Commission and the Court in their opinions gave emphasis to the fact that transit practices are an integral part of the rate structure of the country.

The transit tariffs of the St. Louis-San Francisco and the Illinois Central, and this is also true of the transit tariff of the Columbus and Greenville with respect to shipments of cottonseed originating at points on the Columbus and Greenville and moving via that railroad to its mill points, simply reflect one of the many forms which a transit privilege may take. We know of no transit rule or privilege, however, and the Columbus and Greenville has cited none to this Court, under which a carrier pays a refund to a shipper of a part of the freight charges which that shipper has paid to another railroad for transportation service rendered by such other railroad in moving a commodity into a transit point. The refund under such circumstances becomes a rebate.

What the Columbus and Greenville in substance seeks to do is to equalize by means of an unlawful tariff its

* *Keery Co., Inc. v. New York, O. & W. Ry. Co.*, 206 I. C. C. 585; 211 I. C. C. 451; 226 I. C. C. 335; *Baltimore & O. R. Co. v. United States*, 15 F. Supp. 674; 24 F. Supp. 734. See also *Locklin, Economics of Transportation*, Tr. 629-631.

situation with respect to railroads like the St. Louis-San Francisco and the Illinois Central. Exhibit No. 2, a part of the record in *Investigation & Suspension Docket No. 4599, Allowances on Cottonseed to Columbus and Greenville Ry. Points,* shows the Columbus and Greenville to be a main line of railroad only, with no branch lines.

This Court has more than once said that the law does not attempt to equalize opportunities among localities, or fortunes or abilities (*United States* v. *I. C. R. R. Co.*, 263 U. S. 515, p. 524, citing *Inter. Com. Comm.* v. *Diffenbaugh,* 222 U. S. 42, p. 46). Nor can the law equalize all opportunities among railroads and place one railroad in a position which others occupy because of the length of their lines or the number and length of their respective branch lines.

The Commission itself, when confronted with this situation respecting the location of the railway of the Columbus and Greenville, said (R. 62) in its report in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points,* that the Columbus and Greenville's disadvantage appears to be primarily one of location.

The desire of the Columbus and Greenville to tap the traffic that originates on its connections, short haul those connections and transport the manufactured product of that traffic from mill point via its own line, does not relieve it from the necessity of complying with the law.

As this Court said in *United States* v. *I. C. R. R. Co.*, 263 U. S. 515 (pp. 523-524):

> "The effort of a carrier to obtain more business, and to retain that which it has secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates

were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Inter. Com. Comm.* v. *C. & G. W. Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. * * *"

The self-interest of the Columbus and Greenville, in its effort to obtain additional traffic, cannot possibly serve as an excuse or justification for a plain violation of the law. One of the great purposes of the Interstate Commerce Act is to insure that competition among the carriers should be carried on in accordance with the standards laid down in the Act. Competition has not repealed those standards. There can be nothing unfair or unreasonable in requiring the Columbus and Greenville to abide by the law.

There is another aspect of this particular question that merits consideration by this Court. The plain and intended effect of Tariff No. 81 of the Columbus and Greenville is to deprive the St. Louis-San Francisco and the Illinois Central of their long hauls on the manufactured products of the cottonseed, cottonseed which they originate. The hauls of the St. Louis-San Francisco and the Illinois Central would be confined in respect to those shipments that the Columbus and Greenville is able to capture as the result of this unlawful tariff, to the comparatively short hauls of the cottonseed moving from points of origin on the lines of those railroads via those lines to the mill points. The record in Investigation and Suspension Docket No. 4599, *Allowances on Cottonseed at Columbus and Greenville Points*, shows (Tr. 29) that the average haul of the cottonseed from points of origin to the mill points is about 75 miles.

The Columbus and Greenville in short would deny the branch lines of the St. Louis-San Francisco and the Illinois Central the capacity to make any contribution

to system revenues of these railroads, for these branch lines would be used, insofar as the movement of cottonseed is concerned, not as branch lines feeding traffic to the main lines of the St. Louis-San Francisco or Illinois Central, as the case might be, but as branch lines built and constructed by these railroads to feed traffic to the Columbus and Greenville.

What has been the result in the past of the drying up of traffic on branch lines, and the failure of branch-line traffic to contribute to system revenues? The answer is to be found in the finance reports of the Interstate Commerce Commission dealing with the abandonment of branch lines, and particularly in the experience that the Illinois Central has had in Mississippi in the last fifteen years.

As shown by the published reports of the Commission, the Illinois Central System (the Illinois Central Railroad Company, The Yazoo and Mississippi Valley Railroad Company, and the Gulf and Ship Island Railroad Company) has abandoned during the last fifteen years some 227 miles of branch lines in Mississippi. The total length of the Columbus and Greenville Railway is only 168 miles (Record in *Investigation & Suspension Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Points,* Tr. 41). The decisions of the Commission issuing certificates of public convenience and necessity authorizing the abandonment of these branch lines are found in some twelve volumes of the Commission's finance reports. We cite in a footnote a few of these cases.* These branch lines were aban-

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* *Abandonment of Lines By Mississippi Valley Co. and Illinois Central R. R. Co.*, 145 I. C. C. 289; *Abandonment of Branch Line By Y. & M. V. R. R. Co.*, 145 I. C. C. 393; *Helm and North Western Railroad Abandonment*, 170 I. C. C. 33; *Gulf and Ship Island R. R. Co. Abandonment*, 193 I. C. C. 749; *Y. & M. V. R. R. Co. Abandonment*, 249 I. C. C. 561; *Y. & M. V. R. R. Co. Abandonment*, 149 I. C. C. 613. See in this connection the discussion in the 56th Annual Report of the Inter. Com. Comm. for the year 1942, under the subject "Abandoned Mileage" (pp. 21-23).

doned, as shown by the reports of the Commission, not only because they were operated at a loss but because they failed to contribute a sufficient amount of net revenue to the system to compensate for the losses incurred in their operation.

Under the rules of the Commission specifying the information to be furnished in applications to abandon branch lines of railroad (order of the Commission of December 27, 1941), a railroad must show not only the revenues that should be assigned to the line proposed to be abandoned and the cost of operating that line, but it must also show the operating revenues derived from traffic originating on or destined to points on the line proposed to be abandoned and handled on other parts of the railroad company's system lines, with an estimate of the cost of transporting the traffic on such system lines. The Commission then compares the results of the operations of the branch itself with the contribution that the branch makes to the net revenues of the system. The Commission then arrives at what it designates as system profits or system deficits.**

But railroads like the St. Louis-San Francisco and the Illinois Central are now met with the contention that, notwithstanding the policy of Congress as set forth in the amendment made by the Transportation Act of 1940 to Paragraph (4) of Section 15 of the Act, these branch line railroads should not serve as feeder lines for the main or system lines of these railroads, but should serve, under tariffs established by the Columbus and Greenville alone, as feeders for the Columbus and Greenville. Of course, any such construction of the Interstate Commerce Act would simply lead to a greater increase of abandonments of branch lines, with all that those abandonments mean to local communities served by such lines.

** See, for example, *Y. & M. V. R. R. Co. Abandonment*, 244 I. C. C. 163, p. 167; *Y. & M. V. R. R. Co. Abandonment*, 249 I. C. C. 613, p. 614.

Exhibit No. 2, prepared by the Traffic Manager of the Columbus and Greenville and offered in evidence in *I. & S. Docket No. 4599, Allowances on Cottonseed to Columbus and Greenville Ry. Points,* is a map of the Columbus and Greenville and other lines of railroad in the territory served by the Columbus and Greenville. There are six lines of the Illinois Central System that cross the railroad of the Columbus and Greenville. Three of those lines are essentially branch lines (the lines through Greenville, Moorehead and West Point).

We submit, therefore, that with the consideration we have just discussed in mind, it would not be fair to railroads like the St. Louis-San Francisco and the Illinois Central, wholly aside from the palpable illegality of Tariff No. 81, to continue that tariff in effect, the plain effect of which tariff is to deprive railroads like the St. Louis-San Francisco and the Illinois Central of system hauls on the products of traffic that they originate, and thus endanger the future operations of these branch lines, and all this without any determination by the Commission under Paragraphs (3) and (4) of Section 15 whether these originating railroads should be deprived of their hauls.

The fact should be borne in mind that the local communities now served by the branch lines of the St. Louis-San Francisco and the Illinois Central look to those railroads for transportation service and not to the Columbus and Greenville. There are, therefore, large questions respecting the public interest involved in the determination, which the Commission has never been called upon by the Columbus and Greenville to make, whether through routes should be established under Paragraphs (3) and (4) of Section 15, which would deprive the St. Louis-San Francisco and the Illinois Central of the system revenues from cottonseed originated by them on

their lines in Mississippi and transported by them to mill points.

We submit that in view of what we have said, the cancellation of the Columbus and Greenville's Tariff No. 81, the cancellation of which is required by the plain mandate of the statute, would not operate unfairly and unreasonably in any respect.

(3) What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

This question in the first place seems to contemplate that even though Tariff No. 81 of the Columbus and Greenville be in plain violation of the law, nevertheless that violation should continue pending the institution of some independent proceeding in which the Commission would in some way or other make an appropriate adjustment of rates as between the Columbus and Greenville and the other carriers.

To state this question is to answer it. If there are violations of the Interstate Commerce Act they should be eliminated. And this is just what the Interstate Commerce Commission undertook to do when it made its report and entered its order of January 3, 1942, in the case at bar (R. 5-12). We had not supposed that a plain violation of law on the part of a carrier, such as the Columbus and Greenville, could be clothed with immunity for an extended period to enable the Commission to determine whether or not in some other proceeding, although the Columbus and Greenville has never asked the Commission to institute such a proceeding,

some adjustment of rates could be made as between the Columbus and Greenville and its connecting carriers that would result in increasing the revenues of the Columbus and Greenville.

In *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, this Court had before it the question whether the Stock Yard Company was subject to the jurisdiction of the Interstate Commerce Commission. This Court, in passing upon the question whether the proffered evidence relating to other stock yards was relevant, said (pp. 223-224):

> "The issue to be resolved in the present proceeding is whether the service rendered by appellant at its Chicago stockyard brought it within the jurisdiction of the Commission. To this issue the practices by others at other yards are irrelevant and their bearing on the administrative construction of the statute in the present circumstances is, we think, too remote and indecisive to compel a burdensome inquiry into collateral issues."

The possibilities that may lurk in any future proceeding that the Columbus and Greenville may institute before the Commission are irrelevant on the question whether Tariff No. 81 violates the Interstate Commerce Act, which is the only question before this Court.

In *A., T. & S. F. Ry. Co.* v. *United States et al.*, 279 U. S. 768, this Court in the concluding sentence of its opinion said (p. 781):

> "* * * There is also a suggestion that the Commission should have suspended and ordered canceled the Southern's varying proportional rate. Its action in that respect is not subject to review in this proceeding."

The Columbus and Greenville in its original brief made this statement (p. 6):

> "We submit that the question is not whether some other plan that would accomplish the same results and meet with the approval of the Commission, was available, but solely whether appellee's present practice is lawful."

Question (3) seems to contemplate that in some other proceeding the Commission would have the power to require an adjustment of rates that would increase the revenues of the Columbus and Greenville through a participation by the Columbus and Greenville in the movement of cottonseed originating on the St. Louis-San Francisco and the Illinois Central, moving to mill points, there manufactured and reshipped to destinations in the East. But as can be seen from our discussion of question (2), it is by no means certain in view of the changes made by the Transportation Act of 1940 in Paragraph 4 of Section 15 that this would be the result. For now Congress has spoken in unequivocal language that in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the limitations in clauses (a) and (b) of Paragraph 4 of Section 15, give reasonable preference to the carrier by railroad which originates the traffic.

We submit that the Columbus and Greenville is in a better position than this Court to determine what further steps it should take before the Commission to obtain a determination whether railroads in Mississippi, such as the St. Louis-San Francisco and the Illinois Central, which originate this cottonseed and can carry the products of the cottonseed via their lines to destinations in the North and the East, should be shorthauled. The questions that would be raised by a proceeding under Paragraphs 3 and 4 of Section 15, are questions that address themselves particularly to the administrative tribunal.

The facts before the Court in this case, when read in the light of the provisions of Paragraphs 3 and 4 of Section 15, afford no basis for the assumption which seems to be implied in question (3), that there should be some adjustment of the rates as between the Columbus and Greenville, on the one hand, and the St. Louis-San Francisco and the Illinois Central, on the other. Whether there should be, must in the first instance plainly be determined by the Interstate Commerce Commission. The Columbus and Greenville has had ample opportunity to bring a complaint under Paragraphs 3 and 4 of Section 15, seeking the establishment of through routes and joint rates. But for reasons best known to itself, it has failed to file such a complaint.

The question presented to this Court is whether the order of the Commission in the case at bar is a lawful one. We submit that this Court ought not to go beyond a determination of this issue.

(4) Have the courts power to require the Commission to take such procedure?

This question carries to us the implication that the Commission has not followed such a course of action in the case at bar as it should have followed. The record will not support such a conclusion. As we have seen, the question whether under Paragraphs 3 and 4 of Section 15 of the Act, the St. Louis-San Francisco and the Illinois Central which originate this cottonseed should be shorthauled, and the manufactured products thereof turned over to the Columbus and Greenville at these mill points, is a question that has been neither investigated nor determined by the Commission. The Columbus and Greenville has not called upon the Commission to investigate and determine that question.

If the Columbus and Greenville had shown the zeal, the activity, and the persistency in pursuing such rights as it may possess under Paragraphs 3 and 4 of Section 15 of the Act as it has shown in its efforts to circumvent the provisions of Section 15, as well as Section 6, the Columbus and Greenville would long ago have had an administrative determination of the question whether under Paragraphs 3 and 4 of Section 15 the St. Louis-San Francisco and the Illinois Central should be required to be shorthauled, and the Columbus and Greenville injected as a participating carrier in a through route from the points of origin of the cottonseed to the destination of the manufactured product.

The Commission itself said in its report in *Docket No. 28590, Cottonseed Allowance of Columbus and Greenville Railway Company* (R. 11):

> "* * * Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute."

In *United States* v. *Morgan*, 313 U. S. 409, this Court said (p. 417):

> "We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment."

We are at a loss to understand on what theory this Court should undertake to suggest to the Commission what the Commission should do, let alone requiring the

Commission to act, respecting an issue that has never been presented to the Commission by the Columbus and Greenville: Whether, under Paragraphs 3 and 4 of Section 15 relating to the establishment of through routes and joint rates, some adjustment should be made of the rates that would inject the Columbus and Greenville as an intermediate carrier in through routes and would shorthaul the originating carriers.

It does not appear that this Court should enter an order in this case which is predicated upon the assumption that there are or must be some readjustment of rates as between the Columbus and Greenville on the one hand and the St. Louis-San Francisco and the Illinois Central on the other. To do so the Court would be stepping beyond its functions, its duties, and its powers.

We submit that if this Court should require the Commission to take the procedure outlined in Paragraph (3), this Court would set itself up as an appellate administrative tribunal, which it has said it is not.

As this Court put it in *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287 (p. 304):

> "We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446. * * *"

CONCLUSIONS.

These rail appellants respectfully submit that Columbus and Greenville's Tariff No. 81 violates the Interstate Commerce Act and that the decree of the lower court should be reversed. They further submit that this is the sole question presented to this Court for determination. The Court is not now called upon to go beyond and should not go beyond a determination of this question.

Respectfully submitted,

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May 19, 1943.

APPENDIX A.

Interstate Commerce Act, 49 U. S. C. 1, et seq.:

SEC. 1. (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provision of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such

through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

SEC. 6 (4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

SEC. 6. (6) The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such

regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

SEC. 6 (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reason-

able individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the

burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of the railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

SEC. 15 (13) If the owner of property transported under this part directly or indirectly renders any

service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

APPENDIX B.

Item 100-B (Cancels Item 100-A of Supplement 4).
TERMINAL OR TRANSIT PRIVILEGES OR SERVICES

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to interstate traffic, and with State Commission covering traffic subject to its jurisdiction, for

Terminal or transit privileges or services, including also

Car rental,	Icing,	Storage,
Car service,	Lighterage,	Switching,
Cartage,	Loading,	Transfer,
Demurrage,	Private car mileage,	Transit privileges,
Diversion,	Reconsignment,	Unloading,
Elevation,	Refrigeration,	Weighing.
Heater service,	Stop-off,	

The granting of the privileges and performance of the service described in this item shall be entirely upon the responsibility and at the cost of the carriers granting the privileges and performing the services and without affecting the revenue of any other carrier in the absence of authority therefor from such other carrier.

(Auth DA 60785 / 12-14-38).